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Nos. 79-1739 and 79-1743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,

v.

ATLANTIC RICHFIELD CO., ET AL.

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RICHFIELD CO., ET AL.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court below err in holding that section 4(a) of the Alaska Native Claims Settlement Act confirmed that prior conveyances of land pursuant to federal tentative approvals of State land selections under the Alaska Statehood Act extinguished the aboriginal title (if any) to such lands as of the dates of the prior conveyances or tentative approvals?

2. Did the court below err in holding that section 4(c) of the Settlement Act extinguished all trespass claims of Alaska Natives based on claims of aboriginal right, title, use, or occupancy of land in Alaska?

3. Did the court below err in holding that it was unnecessary to decide the constitutional issues raised by petitioner Inupiat Community?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
A. The Court Below Correctly Decided Straightforward Questions of Statutory Construction, and Its Avoidance of Constitutional Questions Was Plainly Correct in Light of the Teachings of This Court	6
1. Interpretation of Section 4 of the Settlement Act	6
2. The Constitutionality of the Settlement Act	15
B. The Decision of the Court Below Is Not Inconsistent with Any Decision of the Court of Appeals for Any Other Circuit	22
CONCLUSION	23
APPENDIX A	
List of Parties	1a

TABLE OF AUTHORITIES

CASES:

Ashwander v. TVA, 297 U.S. 288 (1936)	21
Coombes v. Getz, 285 U.S. 434 (1932)	16
Dick v. New York Life Ins. Co., 359 U.S. 437 (1959)	21
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	17
Edwardsen v. Morton, 369 F. Supp. 1339 (D.D.C. 1973)	22, 23
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)	6
Etter v. City of Tacoma, 228 U.S. 148 (1913)	16
Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 (1978)	6

Table of Authorities Continued

Page

Hurley v. Kincaid, 285 U.S. 95 (1932) 17

Inupiat Community of the Arctic Slope v. United States, No. 77-596 (Ct. Cl., filed Dec. 16, 1977) ...6, 19

Menominee Tribe v. United States, 391 U.S. 404 (1968) 12, 13

Miller v. United States, 159 F.2d 997 (9th Cir. 1947).. 4

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 2, 4

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 5, 16, 17, 18, 20, 23

Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948) 16

Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937) 4, 8, 13, 16

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) 7, 13, 15, 16

United States v. Causby, 328 U.S. 256 (1946) 17

United States v. Gemmill, 535 F.2d 1145 (9th Cir.), *cert. denied sub nom.* Wilson v. United States, 429 U.S. 982 (1976) 4

United States v. Heinszen & Co., 206 U.S. 370 (1907) .. 16

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 22

United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974) 8, 16

United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941) 7

Yearsley v. Ross Construction Co., 309 U.S. 18 (1940) 17

CONSTITUTIONAL PROVISION:

U.S. Const., Fifth Amendment 7, 13, 15, 17, 19, 21, 23

TREATY:

Treaty of Cession, 15 Stat. 539 (1867) 4

Table of Authorities Continued

Page

STATUTES:

Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* ..... *passim*

Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339 ..... i, 2, 4, 7

Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-62 16

Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-794 16

Tucker Act, 28 U.S.C. § 1491 18

28 U.S.C. § 1505 19

28 U.S.C. § 2501 20

LEGISLATIVE MATERIALS:

S. Rep. No. 91-925, 91st Cong., 2d Sess. (1970) 10

S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971) 9, 10, 11

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BRIEF FOR RESPONDENTS IN OPPOSITION *

STATEMENT OF THE CASE

Petitioners seek damages for alleged trespasses to lands that were subject to claims of aboriginal title by Alaska Natives prior to the enactment of the Alaska

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* This brief is being filed in the interests of all respondents. A list of the parties is attached as Appendix A.

Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.*, on December 18, 1971. This action was commenced on October 7, 1975, by the United States, suing "in its own right and on behalf of the Eskimos inhabiting the Arctic Slope,"[1] against the State of Alaska and, as amended, 142 individual and corporate defendants. The Arctic Slope Native Association and the Inupiat Community of the Arctic Slope filed a joint motion to intervene on December 23, 1975. That motion was subsequently granted with respect to the Inupiat Community.

Native claims were a source of uncertainty in Alaska for more than a century (United States Petition at 25a-30a). Section 6 of the Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339, 340, authorized the State to select 103,350,000 acres of public lands, provided for "tentative approvals"[2] of such selections by the Secretary of the Interior, and authorized the State to execute conditional leases of selected lands following tentative approval (*id.* at 30a-31a). While the Statehood Act contained a disclaimer of State title to any lands "held" by Natives (*id.* at 31a), no lands on the Arctic Slope had ever been recognized by the United States as being held by any Native group. In *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 65-66 (1962), this Court declared:

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[1] The Arctic Slope comprises the northern 56,500,000 acres of Alaska. Its population in 1970 was 3,451 persons, over 90 percent of whom lived in five compact cities or villages, with over 60 percent in the City of Barrow alone. The alleged trespasses occurred primarily in the area of Prudhoe Bay, more than two hundred miles from Barrow.

[2] "Tentative" approvals were final in all respects but for the formality of a patent dependent on a survey.

> "It was understood that the disclaimer provision left the State free to choose Indian 'property' if it desired, but that such a taking would leave unimpaired the Indians' right to sue the United States for any compensation that might later be established to be due."

In these circumstances, "[i]n 1964 and 1965 the State selected, and the Secretary of the Interior tentatively approved, approximately 1,650,000 acres of land on the Arctic Slope, a region in which the existence of large oil deposits was suspected." United States Petition at 32a. In 1964, 1965, 1967, and 1969, the State issued oil and gas leases for some of these tentatively approved Arctic Slope lands. Meanwhile the Secretary of the Interior had authorized various other entries onto Arctic Slope lands under the mining laws. *Id.* at 33a. The overwhelming bulk of the "trespasses" asserted in the present action were made pursuant to, and in reliance on, federal and State authorizations. Natives of the Arctic Slope made claims to rights in the lands in question (though no recognition or adjudication of those claims had—or has to this day—ever occurred) and asserted that the entries were therefore trespassory. Controversy over such Native claims asserted statewide led to the enactment in 1971 of the Alaska Native Claims Settlement Act, by which Congress intended through the legislative process to resolve all disputes concerning Native claims based on alleged aboriginal title in Alaska, and believed that it had done so.

Petitioners allege that Alaska Natives enjoyed the exclusive use and occupancy of land in Alaska from time immemorial, and that therefore those Natives held unrecognized aboriginal title to such lands until all such titles were extinguished by the Settlement Act.

Petitioners contend that pre-Settlement Act entries on Native-claimed lands were trespasses; specifically, they claim that the federal and state actions approving such entries are invalid because of the existence of claims of aboriginal title. Petitioners further assert that claims based on those alleged trespasses were not extinguished by the Settlement Act. The Settlement Act was intended to effect an orderly political resolution of decades of controversy over Native claims in Alaska. The Act admittedly did extinguish all aboriginal titles for the future. It provided for the grant to Alaska Natives of $962,500,000 in cash and more than 40,000,000 acres of land. In spite of all this, petitioners nonetheless claim that the Act was intended (or was constitutionally required) to preserve claims for alleged pre-Settlement Act trespasses, many of which had been federally authorized. The resolution of these claims would require years of litigation in the courts.[3]

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[3] Among the issues that would have to be addressed in such litigation are (1) whether the Inupiat Community has and has had the degree of coherence and organization required to make it an entity capable of exercising aboriginal title; (2) as to each and every portion of the Arctic Slope where trespasses are alleged, whether any Native use and occupancy met the tests for aboriginal title as established by judicial decisions; (3) whether any aboriginal title had been extinguished by the Treaty of Cession of 1867, *see* Miller v. United States, 159 F.2d 997 (9th Cir. 1947), or by any or all of a host of federal statutes, policies and actions dealing with Alaska lands from 1867 to 1958, *see* Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937); United States v. Gemmill, 535 F.2d 1145 (9th Cir.), *cert. denied sub nom.* Wilson v. United States, 429 U.S. 982 (1976), up to and including the Alaska Statehood Act and federal actions thereunder, *see* Organized Village of Kake v. Egan, 369 U.S. 60, 65-66 (1962); (4) the location of and responsibility for each entry by one or more of the 143 respondents onto any portion of the Arctic Slope between 1867 and 1971; (5) the nature and amount of damages from each such entry; and (6) various questions of contribution and indemnification among the 142 private respondents, the State of Alaska, and the United States.

Respondents moved to dismiss all trespass claims of petitioners based upon any alleged aboriginal title. The district court issued its opinion on June 3, 1977, and by its order dated July 5, 1977, dismissed the complaints. The district court's decision was unanimously affirmed by the court below on January 4 of this year. Rehearing was denied on February 22.

Both lower courts agreed that, assuming without deciding that Alaska Natives held aboriginal title to any portion of the Arctic Slope at the time the entries complained of were made, those entries made on lands that had been conveyed pursuant to federal law or selected by the State of Alaska with federal "tentative approval" were not trespasses because section 4(a) of the Settlement Act had confirmed these prior conveyances and tentative approvals, thereby extinguishing any aboriginal titles as of the dates of the conveyances or tentative approvals. In addition, both courts agreed that *all* claims of trespass that were based on claims of aboriginal title to Alaska lands had been explicitly extinguished by section 4(c) of the Settlement Act.

Finally, the court of appeals found it unnecessary to pass on the Inupiat Community's argument (not raised by the United States) that the Settlement Act, as construed by both courts, is unconstitutional as taking alleged property rights (trespass claims) without just compensation. The district court had rejected the Inupiats' constitutional argument on the merits; the court of appeals held, following the doctrine of *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974), that, even assuming that the Inupiats were entitled to compensation, the Settlement Act did not impair their right to obtain it in a Court of Claims action.

A lawsuit seeking compensation for any such taking is, in fact, now pending in the Court of Claims. *Inupiat Community of the Arctic Slope* v. *United States,* No. 77-596 (Ct. Cl., filed Dec. 16, 1977). In its Court of Claims action the Inupiat Community is seeking damages from the United States for, *inter alia,* breach of its trust responsibilities by authorizing the alleged trespasses and, in the alternative, just compensation for the alleged taking of the Inupiats' trespass claims.

REASONS FOR DENYING THE WRIT

A. The Court Below Correctly Decided Straightforward Questions of Statutory Construction, and Its Avoidance of Constitutional Questions Was Plainly Correct in Light of the Teachings of This Court.

1. *Interpretation of Section 4 of the Settlement Act*

The constructions given to section 4(a) and 4(c) of the Settlement Act by the courts below are consistent with, and compelled by, the language and legislative history of those sections. Accordingly, the questions of statutory construction presented by this case have no special claim to this Court's attention.

a. The starting point in this case, as in every case involving statutory construction, is the language of the statute itself. *See, e.g., Greyhound Corp.* v. *Mt. Hood Stages, Inc.,* 437 U.S. 322, 330 (1978); *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976). The language of sections 4(a) and 4(c) could scarcely be clearer:

> "(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska

> Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> * * *
>
> "(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished."

Section 4(b), which is not in controversy, extinguishes any aboriginal title that might have existed in Alaska on the date of the Act.[4]

Both courts below correctly held that section 4(a) extinguished aboriginal titles as of the dates of the prior conveyances and tentative approvals of state selections. United States Petition at 5a-7a, 46a-54a. The entries made pursuant to those authorizations must now be regarded as non-trespassory, because the basis of the Natives' right to object to the entries—their claimed aboriginal title—was extinguished by Congress as of dates prior to the entries. It was within Congress' power to validate the prior conveyances and

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[4] Petitioners concede that they have no Fifth Amendment claim against the United States for the taking of the unrecognized aboriginal title itself. As this Court held in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States." *Id.* at 285. Quoting with approval from the decision in United States v. Santa Fe Pacific R.R., 314 U.S. 339, 347 (1941), the Court also noted that the "power of Congress in that regard is supreme. The manner, method, and time of such extinguishment raise political, not justiciable, issues." 348 U.S. at 281.

tentatives approvals. *See, e.g., Shoshone Tribe of Indians* v. *United States,* 299 U.S. 476, 495-96 (1937); *United States* v. *Northern Paiute Nation,* 490 F.2d 954, 958 (Ct. Cl. 1974).

While section 4(a) eliminated many of petitioners' claims, section 4(c) explicitly eliminated all of them. Again, neither the district court nor the court of appeals had any difficulty in concluding that section 4(c) extinguished all aboriginal trespass claims. United States Petition at 7a-8a, 55a-65a. Such claims are "based on claims of aboriginal right"—because proof of aboriginal right or title is an essential element of the claims, as petitioners concede—and thus fall within the explicit terms of section 4(c). Moreover, as the court below explained, a different construction would leave significant portions of the section superfluous or meaningless:

> "The subsection reads, 'All claims against the United States, the State, and all other persons that are based on claims of aboriginal right . . . are hereby extinguished.' Since only the United States could extinguish the Natives' aboriginal title, only the United States could be the defendant in a suit based on extinguishment of title. Yet all claims against 'the State, and all other persons' were extinguished as well. In order to make the language regarding 'the State, and all other persons' meaningful, there is no choice but to construe the statute to extinguish certain types of claims, 'based on aboriginal right,' that might be brought against the State and other persons. The quintessential action against private citizens, based on aboriginal title, is an action for wrongful invasion, use, and assertion of dominion over the property—trespass." United States Petition at 7a-8a.

Thus, the court below correctly held that in section 4(c) Congress clearly and unequivocally stated its intention that all claims based on claims of aboriginal title, including trespass claims, be extinguished.

b. The Inupiat Community bases its argument primarily on its reading of the legislative history of the Settlement Act. The court below reviewed the legislative history in detail, noting in particular the repeated statements in that history to the effect that the Settlement Act was to be "broadly" applied so as to extinguish "all aboriginal claims," and concluded that "it would be incomprehensible to us if Congress did not intend to extinguish the trespass claims, along with all other claims based on aboriginal title, when it gave the Natives over 60,000 square miles of fee simple land and almost a billion dollars." United States Petition at 10a-11a.

The only argument requiring discussion that bears on the proper construction of section 4(a) or 4(c) is the Inupiat Community's argument that the report on the Settlement Act issued by the Senate Committee on Interior and Insular Affairs in 1971, S. Rep. No. 92-405, expressed a congressional intention that the Act not extinguish Native "tort" claims. Inupiat Community Petition at 18-20.[5] The issue was thoroughly briefed by all parties and was discussed at considerable length in the opinions of both courts below. United States Petition at 11a-14a, 58a-65a. The court of ap-

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[5] The United States, in contrast to the Inupiat Community, concedes that the legislative history of the Act is not dispositive in its favor. United States Petition at 7. Respondents submit that the history is dispositive against both petitioners.

peals adopted the reasonable interpretation of the 1971 Senate Report language referring to tort claims:

> "True, the report language preserves suits 'for tort,' and trespass is a tort. However, we think that the Senate's meaning, as indicated by the three other kinds of action it specifically preserved and by the legislative history generally, was that all kinds of civil action were preserved if they were not based in any way on aboriginal title. Thus, such 'tort' actions as those based on personal injury or damage to personal property would not be extinguished. The passage is no better than ambiguous on the issue of whether or not trespass actions based on aboriginal title were to be preserved." United States Petition at 12a.

Moreover, the 1971 report contained, in addition to the language relied on by petitioners, an unequivocal declaration that section 4(c) constitutes "a full and final extinguishment of any and all claims based upon aboriginal . . . title." Thus, taken as a whole, the Senate Report is consistent with the interpretation of the Act adopted by the courts below.

Both courts also noted that the passage on which the Inupiat Community relies is of doubtful value in light of its origins. The 1970 Senate bill and report both spoke of extinguishing *land* claims as distinguished from "claims based on grounds other than loss of original Indian title land." In 1971 the Senate committee excised from the bill the language referring to land claims and substituted the broader formula extinguishing "claims based upon aboriginal right, title, use or occupancy." However, the corresponding change was not made in the 1971 Senate report. The court below concluded that, even if the language in

the 1971 report meant what petitioners claim, the two sentences involved did not override the remainder of the legislative history, which the court had reviewed thoroughly.[6]

Finally, the court below correctly concluded that, even if the contested language in the 1971 Senate report meant what petitioners claim, it was clear that the bill which became the Settlement Act "followed the intent" of the 1971 House bill, not the Senate bill discussed in the Senate committee's report. United States Petition at 15a. The language of the 1971 Senate report does not, therefore, provide a basis for ignoring the plain language of section 4 or the legislative history directing that the Settlement Act's extinguishment provisions be broadly applied.

c. The principal argument of the United States is that the court of appeals improperly applied rules of construction established by this Court, although the United States concedes that the court did not overlook the applicable rules. United States Petition at 6-7. Petitioners also argue that the court below erred in construing the Act in a way that exposes the United States to what the petitioners claim (without any support in the record) would be a potentially large liability. However, nothing in the court of appeals' decision establishes that the United States will have any liability whatever to the Alaska Natives for the alleged taking of accrued Native trespass claims; nor is the

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[6] The Inupiats make much of the fact that the court of appeals at one point referred to the language of the 1971 Senate Report as a possible "hasty mistake." Inupiat Community Petition at 18-20. They conveniently ignore the court of appeals' thorough analysis of the legislative history as a whole, which led the court to adopt a construction of the Settlement Act that followed both the plain meaning of the statute and Congress' expressed intentions.

United States prejudiced by the decision below in any way in the Court of Claims suit now pending.[7]

The decision in *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968), was not, as the United States suggests, United States Petition at 8, based on a general rule requiring an interpretation of statutes that would avoid subjecting the United States to liability for just compensation. The question in *Menominee* was whether Congress had taken hunting and fishing rights that it had explicitly granted to the Indians in a treaty. In concluding that no taking had occurred, the Court relied in a subsidiary fashion on the principle that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." 391 U.S. at 413. The State of Wisconsin had argued that a statute implicitly took the Indians' hunting and fishing rights, but the Court held that the statute had to be read in connection with other legislation, passed by the same Congress, which made it clear that the Indians' rights were not to be affected. Unlike the statutory language here, the language in *Menominee* was ambiguous and so required construction through extraneous means.

In the present case, moreover, the Natives had only unrecognized aboriginal title upon which to base their trespass claims. In contrast to treaty rights, which

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[7] If the present respondents were held liable to the Inupiats, they would of course claim over against the United States for having induced the trespasses by granting tentative approvals of State land selections and by other federal authorizations. Many of the defendants asserted that claim by way of counterclaims in their answers to the complaints herein. Thus reversal of the decision below would by no means absolve the United States of liability as its petition assumes.

are protected by the Fifth Amendment, Congress had plenary power to extinguish that unrecognized aboriginal title without liability for compensation. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955). Thus the district court here was on sound ground in holding that no compensable taking occurred when the trespass claims were extinguished by the Settlement Act. (See p. 15-16 & n.8, *infra.*) Certainly there was no established doctrine to the contrary that Congress could be assumed to have taken into account. In *Menominee,* in contrast, the law was well known and beyond dispute that a taking of treaty rights would require compensation. 391 U.S. at 407 & n.4, 413 n.15; *Shoshone Tribe* v. *United States,* 299 U.S. 476, 497 (1937). It was in this context that the Court observed, after having decided the issue on the other grounds described above, that Congress was unlikely to have deliberately subjected the United States to a claim for a taking of treaty rights without making the taking explicit. *Menominee* furnishes no basis for attacking the decision below.

Finally, petitioners' assertion that the court below misapplied the principle of statutory construction that statutes are to be construed in favor of Indians is unsound. On the contrary, the court below accepted this principle as a "guideline" and applied it in a manner appropriate to the circumstances of this case:

> "[This] rule of construction . . . is based on a concern that the powerful not take advantage of the helpless and uneducated. . . . Where, as here, the Inupiats were represented before Congress by such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark, we think the rule of con-

> struction operates with less force." United States Petition at 16a.

The court also correctly held that Congress' own mandate that the extinguishment provisions are to be "broadly" construed "takes precedence over generalized rules of construction." *Id.*

The United States contends that the court below failed properly to apply three other canons of construction which the court expressly recognized: that ambiguous statutes should be construed " '(2) to avoid constitutional questions; (3) to avoid taking vested rights; and (4) non-retroactively.' " United States Petition at 7. But the court below dealt with these canons in a wholly satisfactory manner. There is no substantial constitutional question, since even if there was a taking the Court of Claims remedy makes it a compensated taking. In the unlikely event that "vested rights" are involved, the Court of Claims remedy will vindicate them. The "retroactivity" point involves only section 4(a), not the completely dispositive section 4(c); and a non-retroactive construction of section 4(a) would involve torturing the plain meaning of Congress' language and intent to an extent the court below quite correctly found impermissible.

Contrary to petitioners' assertions, this case does not present any substantial question of statutory interpretation. The language of the pertinent provisions is clear. The legislative history of the Settlement Act is consistent with the plain meaning of section 4(a) and 4(c). And all pertinent principles of statutory construction were properly applied by the court below.

2. *The Constitutionality of the Settlement Act*

The Inupiat Community asserts that the court below failed to consider a constitutional question that, if decided in its favor, would require that the district court's dismissal of its complaint be reversed. The Inupiat Community urges, in essence, that if the Settlement Act extinguished the accrued aboriginal trespass claims of Alaska Natives it did so unconstitutionally because (1) such trespass claims constitute vested property rights that, under the Fifth Amendment, the United States may not take or extinguish without payment of just compensation, and (2) the more than forty million acres of land and nearly one billion dollars that Congress gave Alaska's Natives in settlement of their aboriginal-title claims and claims based thereon did not constitute just compensation for the claims extinguished. The Inupiat Community thus contends that the Settlement Act must either be held unconstitutional or be construed as not extinguishing accrued aboriginal trespass claims.

The United States, which raised no Fifth Amendment issue below, nonetheless is unhappy that the taking question remains open and would like this Court to decide it now rather than leaving it to orderly adjudication in the Inupiats' pending Court of Claims action.

The district court held that the Inupiat Community's constitutional claim is without merit, essentially on the ground that since under *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955), aboriginal title is not a constitutionally protected interest and may be extinguished by Congress without any requirement of compensation, trespass claims based on aboriginal title

can enjoy no higher status. While the district court's reasoning is correct,[8] the court of appeals was also correct in finding it unnecessary to reach the constitutional issue because, if the Natives' extinguished trespass claims were constitutionally protected, any additional compensation that the Natives might be due would be available in the Court of Claims.

This Court addressed the identical issue in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). Those cases involved challenges by railroad creditors and others to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-794. That Act provided for the transfer, for reorganization purposes, of properties of certain northeastern railroads to a new corporation, with significant consequences for

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[8] In *Tee-Hit-Ton,* this Court held that Indian occupation of land without government recognition of ownership creates *no* rights against taking or extinction by the United States. 348 U.S. at 285. Since the greater interest—the use and occupancy of the lands—is not constitutionally protected, trespass claims to protect that interest are not constitutionally protected either. The cases on which petitioners rely to show that accrued claims are constitutionally protected are all distinguishable. Interests subject to legislative control may be extinguished without compensation, as were the claims under the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-62. *See, e.g.,* Seese v. Bethlehem Steel Co., 168 F.2d 58, 64 (4th Cir. 1948). Coombes v. Getz, 285 U.S. 434 (1932), and Ettor v. City of Tacoma, 228 U.S. 148 (1913), relied on by the Inupiats, both involved preservation of claims that were contractual in nature, which the state could not impair without compensation.

Moreover, the federally authorized entries could constitutionally be (as they were) ratified and validated by section 4(a) so as to render them non-trespassory. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 495 (1937); United States v. Heinszen & Co., 206 U.S. 370, 382 (1907); United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974).

creditor claims against the railroads. The creditors argued, just as the Inupiats do here, that the compensation fixed by Congress was inadequate and that therefore the legislation effected a taking of their property without payment of just compensation. This Court, however, sustained the constitutionality of the statute without reaching the question whether a constitutionally compensable "taking" had occurred:

> "The general rule is that whether or not the United States so intended, '[i]f there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction of the Court of Claims to hear and determine.' *United States* v. *Causby,* 328 U.S. 256, 267 (1946). '[I]f the authorized action . . . does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims.' *Yearsley* v. *Ross Construction Co.,* 309 U.S. 18, 21 (1940). See also *Hurley* v. *Kincaid,* 285 U.S. 95 (1932). In *Yearsley,* the Court, speaking through Mr. Chief Justice Hughes, went on to hold that 'it cannot be doubted that the remedy to obtain compensation from the Government *is as comprehensive as the requirement of the Constitution* . . . .' 309 U.S., at 22." 419 U.S. at 126-27 (footnote omitted) (emphasis in original).[9]

Thus, because the creditors had an adequate remedy in the Court of Claims for any taking effected by the Act, no uncompensated taking of constitutionally pro-

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[9] The analysis and holding of the Regional Rail Reorganization Act Cases were reaffirmed and applied by this Court in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 94 n.39 (1978).

tected property could occur. Arguments that statutes were unconstitutional because they might involve takings would therefore fall unless the court discerned a "clearly expressed congressional intention," *id.* at 133, to repeal the Court of Claims' Tucker Act jurisdiction. Whether Congress intended to effect a "taking," whether Congress intended that compensation be available,[10] whether Congress had provided compensation that it believed adequate—all these questions are irrelevant to the constitutionality of the statute so long as the pre-existing Tucker Act jurisdiction was not repealed. *Id.* at 126-36. Since neither petitioner alleges that the legislative history of the Settlement Act contains any evidence that Congress intended to repeal Tucker Act jurisdiction over the taking issue, and since in fact there is no such evidence, the *Rail Cases* decision is dispositive here.

The Inupiat Community is asking this Court to decide the taking question before it has been properly presented to any court. Its petition is premised on the assertion that if its trespass claims have been extinguished then a taking has occurred for which compensation is due; yet the taking issue cannot finally be resolved in a private trespass action. In fact, the

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[10] While Congress' intention as to the availability of compensation through the Court of Claims route is irrelevant under the Regional Rail Reorganization Act Cases, petitioners are disingenuous in professing shock that there is even a possibility that the federal treasury rather than the State of Alaska and the private defendants herein might end up paying for the alleged trespasses. The federal role in authorizing and inducing the entries in question, see United States Petition at 30a-33a, makes such a result appropriate. That result would probably have obtained in this action, even had petitioners prevailed, through a judgment in defendants' favor on their counterclaims against the United States. See p. 12 n.7, *supra*.

Inupiat Community has already proceeded in the correct forum for its taking claims, by bringing its suit for just compensation in the Court of Claims. *Inupiat Community of the Arctic Slope* v. *United States,* No. 77-596 (Ct. Cl., filed Dec. 16, 1977).[11] Since the Settlement Act contains no hint of a "clearly expressed congressional intention" to repeal the Court of Claims' Indian Tucker Act jurisdiction, that court's authority to hear the case is clear. *See* 28 U.S.C. § 1505.

The United States (Petition at 9) suggests that its position in the Court of Claims action will be prejudiced if the decision below is permitted to stand. However, the court of appeals was careful not to pass judgment on any aspect of the taking question:

> "The constitutional question we are asked to obviate is whether or not under the Fifth Amendment compensation must be paid for taking the Inupiats' trespass claims. Our holding here clears the way for this question to be addressed in some other forum, but we express no opinion on what the answer should be." United States Petition at 16a-17a.

The Court of Claims is not, as the United States contends, limited to a choice between awarding relief against the United States and leaving the claimants "wholly without remedy." Given the essentially political nature of unrecognized aboriginal claims, Congress appropriately provided a legislative rather than a judicial remedy, and it granted generous compensa-

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[11] To prevail in the Court of Claims, the Inupiats will be required: (a) somehow to overcome the powerful arguments that no compensable taking was involved, see p. 12 n.8, *supra,* and (b) to prevail on each of issues (1) through (3) listed at p. 4 n.3, *supra.* Any recovery, let alone a substantial recovery, by the Inupiats is highly improbable.

tion for the package of interests it extinguished in the Settlement Act, giving the Natives more than 40,000,000 acres of land and nearly a billion dollars. The Court of Claims might well decide, even in the unlikely event that it found a taking, that no further compensation is due to be awarded.[12]

In any event, it is premature for this Court to consider such questions at this time. If the Inupiat Community pursues its Court of Claims action, and if that Court should reach the taking claim [13] and should render a decision adverse to the United States on that claim, this Court will have an opportunity to consider all aspects of the taking question in its proper setting.[14]

If the United States has "one hand tied," United States Petition at 9, in that it will be precluded from arguing in the Court of Claims that the Inupiats'

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[12] The court of appeals' comment that the Inupiat Community might recover from the United States the damages that it is seeking against the private respondents in this case was sheer speculation. Furthermore, the amount of damages (if any) to which the petitioners would be entitled in this case is the subject of sharp controversy.

[13] The taking issue is entirely "hypothetical or speculative," *Rail Cases*, 419 U.S. at 143, until the breach-of-trust issues are decided by the Court of Claims. A decision on those issues may moot the taking issue.

[14] The Inupiat Community contends that other suits will be brought by Alaska Natives in the Court of Claims for just compensation if the decision below is not reviewed. Inupiat Community Petition at 23. However, any other such claims would be barred by the applicable statute of limitations, 28 U.S.C. § 2501, since they accrued on the enactment of the Settlement Act of 1971, more than six years ago. The Inupiats themselves admit (Petition at 10) that they brought their action in 1977 because they "were forced by statute of limitations considerations" to do so.

proper remedy is against the present defendants, the United States has no one but itself to blame. It was the United States, not these defendants, that initiated the trespass litigation and pressed it to conclusion while acquiescing in a stay of the Court of Claims proceeding. Moreover, in the court below the United States expressly disavowed both aspects of the Inupiats' constitutional claim—that it should be decided in this case, and that the Settlement Act is unconstitutional:

> "[The Inupiats claim] that the destruction by Congress of accrued common-law trespass claims amounts to the destruction of a compensable property right protected by the Fifth Amendment, and that to read the Settlement Act as wiping out the claims in this case implicates the Act's constitutionality. *The United States does not go this far. Nor do we say that the district court's decision works an unconstitutional result.* What we do say is that it is out of keeping with those canons of judicial interpretation which disfavor retroactive operation of the law, and which favor the resolution of statutory ambiguities to the advantage of Native Americans." Brief of the United States in the Ninth Circuit, p. 74 (emphasis added).

The fact that the United States is now unhappy with its strategy throughout this case is no justification for its request that this Court violate the fundamental, well-established rule that questions will not be decided when deciding them is wholly unnecessary for the resolution of the litigation before it. *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445 (1959); *see also Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). The United States has not shown, and cannot show, any reason why a decision on whether

the Inupiats are entitled to recover in their Court of Claims action is necessary—or even relevant—to a decision of petitioners' present lawsuit against the State of Alaska and 142 private defendants. In fact it is plain that such a decision is altogether unnecessary.

B. The Decision of the Court Below Is Not Inconsistent with Any Decision of the Court of Appeals for Any Other Circuit.

Both the United States and the Inupiat Community make much of the decision of the United States District Court for the District of Columbia in *Edwardsen* v. *Morton,* 369 F. Supp. 1359 (D.D.C. 1973), an interlocutory decision denying summary judgment. No final judgment was ever entered, and the decision was never appealed to the United States Court of Appeals for the District of Columbia Circuit. Indeed, since the case was settled, the United States could not appeal the interlocutory order denying summary judgment. After the district court dismissed the action on February 17, 1977, in accordance with the settlement, the *Edwardsen* decision retained no precedential value. *Cf. United States* v. *Munsingwear, Inc.,* 340 U.S. 36 (1950). Obviously *Edwardsen* provides no basis for a conflict between courts of appeals on any issue involved in this case. To the best of respondents' knowledge, the United States Court of Appeals for the Ninth Circuit is the only court of appeals to have construed section 4(a) and 4(c) of the Settlement Act.

Even if the *Edwardsen* decision had been affirmed by the Court of Appeals for the District of Columbia Circuit, there still would be no conflict of any substance between that court and the court below. The court in *Edwardsen* refused to construe section 4(c)

of the Settlement Act as extinguishing all aboriginal trespass claims primarily, if not exclusively, on the ground that such claims "are vested property rights protected by the Fifth Amendment." 369 F. Supp. at 1379.[15] The court below, however, held only that the Settlement Act in fact did extinguish accrued trespass claims and expressly declined to decide "whether or not any Fifth Amendment compensation is required at all for the Native properties and interests taken and extinguished by the United States." United States Petition at 17a. Thus there is no conflict between the *Edwardsen* court and the court below on the Fifth Amendment issue discussed in *Edwardsen* and, therefore, no necessary conflict on the proper interpretation of section 4(c) of the Settlement Act.

CONCLUSION

Petitioners have failed to demonstrate that this case presents any substantial question of federal law of sufficient importance to warrant this Court's attention. The decision of the court below is not in conflict with any decision of any other court of appeals. The petitions for a writ of certiorari should, therefore, be denied.

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[15] *Edwardsen* was decided prior to this Court's decision in the Regional Rail Reorganization Act Cases, *supra*, and the defendants (who were federal officials) never suggested to the *Edwardsen* court that the constitutional issue might be avoided because of the availability of a Court of Claims action. Indeed the *Edwardsen* decision was made in the context of an almost total absence of briefing and argument on the constitutional issue.

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APPENDIX

APPENDIX A

List of Parties

United States of America

Inupiat Community of the Arctic Slope

Atlantic Richfield Company

Alaska Airlines, Inc.

Alaska Barge & Transport, Inc.

Alaska General Construction Company

Alaska Geophysical, Inc.

Alyeska Pipeline Service Company

Amerada Hess Corporation

Arco Pipe Line Co.

Arctic Marine Freighters

ATCO Housing, d/b/a ATCO Structures, Inc.

The Atlantic Refining Company

Atwood Enterprises, Inc.

State of Alaska

Battelle Pacific Northwest Laboratories

Better Concrete Products Corporation

Boatel Alaska, Inc.

Borst & Giddens Oil Well, d/b/a Logging Service, Inc.

BP Alaska Exploration, Inc.

BP Alaska, Inc.

BP Pipelines, Inc.

Brinkerhoff Drilling Company, Inc.

British American Oil Producing Company

BP Oil Corporation

Burgess Construction Company

Burns International Security Services, Inc.

Cities Service Oil Company

Coastal Drilling Company

Cochran-Dean Co.

Colorado Oil and Gas Corporation

Conoco, Inc.

Core Laboratories, Inc.

C. R. Lewis, Inc.

Continental Laboratories, Inc.

Digicon Alaska, Inc.

Dowell Division of Dow Chemical Company

Dresser Industries, Inc. Petroleum & Minerals Group, Oilfield Products Division, Alaska

Dye Construction, Inc.

Earthmovers of Fairbanks, Inc.

Eastman Oil Well Survey Company

ERA Helicopters, Inc.

Evergreen Helicopters of Alaska, Inc.

Exploration Logging of U.S.A.

Exxon Co. U.S.A.

Exxon Pipeline Company

Forest Oil Corporation

Fricks Flying Service

Frontier Rock & Sand, Inc.

General Construction Company

Geophysical Service, Inc.

Globe Construction Company

Globe Universal Sciences, Inc.

Goodyear Tire & Rubber Company

Gulf Oil Corporation

Halliburton Company

Hamilton Brothers Oil Company

Hewitt Lounsbury & Associates

Home Petroleum Corporation

Home Pipe Line Company

Hunt Oil Company

Home Oil Company of Canada

Homer Freight, d/b/a Homer Transfer Company, Inc.

Humble Oil & Refining Corp.

Interior Airways, Inc.

J & J Equipment, Inc. of Alaska

J & J Excavating, Inc.

James A. Dalton & Assoc.

Kaiser Steel Corporation

Lindsay & Associates

Locher Construction Company, d/b/a Locher Company, Inc.

Loffland Brothers Company

Lorac Service Corporation

Madrel, d/b/a Ray Geophysical

McCulloch Oil Corporation

Marathon Oil Company

Merric, Inc.

Michael Baker, Jr., Inc.

Mobil Oil Corporation

Mobil Pipe Line Company

R. B. Montgomery Drilling, Inc.

Mukluk Freight Lines, Inc.

Nabors Alaska Drilling, Inc.

Mullen Corporation

National Geophysical Company Inc.

National Mechanical Contractors, Inc.

Newmont Oil Company

Niedermeyer-Martin Co.

North State Telephone Co., Inc.

Northern Transportation Co.

Occidental Petroleum Corporation

Oilfield Service, Inc.

Olympic, Inc.

Pacific Inland Navigation Company

Pan Alaska Airways (LTD)

Pan American Petroleum Corporation

Parker Drilling Company

Peter Bowden Drilling Services, Ltd.

Phillips Petroleum Corporation

Pipeline Technologists, Inc.

Placid Oil Company

Polar Oil Field Services, Inc.

Polaris Drilling Company

Prudhoe Bay Communications, Inc.

Puget Sound Tug & Barge Company

Ramstad Construction Co.

Reading & Bates Offshore Drilling Company

Reading & Bates Oil and Gas Co.

Red Dodge Aviation, Inc.

Richfield Oil Corporation

Rivers C. & M. Co.

Rowan Drilling Company, d/b/a Rowan Drilling U.S.

S & G Construction, Inc.

S. S. Mullens, Inc., d/b/a S. S. Mullen Construction Co.

Schlumberger, Ltd.

Sea Airmotive, Inc.

Shell Oil Company

Shellabarger Flying Service

Sinclair Oil Corporation

Sinclair Oil Corp. of New York

Sourdough Freight Lines, Inc.

Socony Mobil Company, Inc.

Sohio Petroleum Company

Sperry-Sun Wells Surveying Company

Spruce Equipment Company

Standard Oil Company of California

Stutzmann Engineering Associates

Sun Oil Company

The Superior Oil Company

Teledyne Exploration Company

Teledyne Industries, Inc.

Texaco, Inc.

Trans Arctic, Inc.

Union Oil Company of California

United Geophysical Corporation

Universal Services, Inc.

Wagley, Inc.

Westeco Systems, Inc.

Western Geophysical Company of America

Western Offshore Drilling and Exploration Company (WODECO)

Whipstock Alaska

Wien Air Alaska, Inc.

Winship Air Service

Woodward-Lundgren Associates